Supreme Court, U.S.
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No. 95-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JOSE R. BRAVO, JAMES G. HUTTO,
RICHARD D. LICHTERMANN, GROVER N. LIPE, JR.,
MARK S. LOMBARDO, EDWARD A. LYONS,
and STEVEN R. OLIVER,

Petitioners,

v.

NATIONAL MEDIATION BOARD and AIR LINE
PILOTS ASSOCIATION,

Respondents.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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January 1996

34 pp

QUESTION PRESENTED FOR REVIEW

Did the Circuit Court's affirmance of the dismissal of petitioners' complaint under Federal Rule of Civil Procedure 12(b)(1) violate the First and Fifth Amendments to the Constitution of the United States or the Railway Labor Act, where:

I. petitioners incorporated in the complaint expert scientific evidence never before considered by any court, demonstrating that respondent National Mediation Board's "majority-of-the-majority" election-rule and standard ballot (i) are unreasonable and unreliable means to determine the will of a majority of employees in a "craft or class" as to union representation, but (ii) under the circumstances of this case caused (and in any similar case will likely cause) certification of a *minority* representative;

II. the evidence showed that use of that rule and ballot to certify respondent Air Line Pilots Association as a *minority* representative

A. deprived petitioners of rights guaranteed by the First and Fifth Amendments to the Constitution of the United States; or, in the alternative,

B. was a gross violation of the Railway Labor Act;

III. the Circuit Court's judgment precluded the use of petitioners' expert scientific evidence to challenge the competence of the National Mediation Board's election-procedures (and in all cases similar to this will preclude the use such evidence); and

IV. the Circuit Court's judgment in this case licensed (and in all cases similar to this will license) the National Mediation Board to certify a union as the representative of a "craft or class", notwithstanding that that union is designated by only a *minority* of the employees eligible to vote?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties in the United States Court of Appeals for the District of Columbia Circuit included:

(i) Jose R. Bravo, James G. Hutto, Richard D. Lichtermann, Grover N. Lipe, Jr., Mark S. Lombardo, Edward A. Lyons, Steven R. Oliver, and Federal Express Pilots for a Non-Union Operation, Inc., plaintiffs-appellants. The individuals are petitioners here.

(ii) the National Mediation Board and the Air Line Pilots Association, defendants-appellees. These parties are respondents here.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

TABLE OF ABBREVIATIONS xiii

INTRODUCTION 1

DECISIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

I. The parties 2
II. The operative facts 3
III. The Pilots' claims in the District Court 7
A. The "majority-of-the-majority rule" 7
B. The standard ballot 8
IV. The District Court's decision 9
V. The Court of Appeals' judgment 9

ARGUMENT FOR ALLOWANCE OF THE WRIT 10

I. By licensing the NMB to certify *minority* unions as representatives under the Railway Labor Act,

TABLE OF CONTENTS - Continued

Page

the Circuit Court's judgment endangers labor peace in interstate commerce. 11

II. The Circuit Court's judgment abridges the Pilots' freedom of association, guaranteed by both the Railway Labor Act and the Constitution. 12

III. The Circuit Court's judgment presents the question of the unconstitutionality of the Railway Labor Act reserved in *Virginian Railway v. System Federation No. 40*, 300 U.S. 515 (1937). 21

IV. The Circuit Court's judgment licenses a "gross violation" of the Railway Labor Act. 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 12, 16, 20

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 14

Bandini Petroleum Co. v. Superior Court,
284 U.S. 8 (1931) 19

Boos v. Barry, 485 U.S. 312 (1988) 18

Borden's Farm Products Co. v. Baldwin,
293 U.S. 194 (1934) 17

BRT v. Virginia *ex rel.* Virginia State Bar,
377 U.S. 1 (1964) 12

BRAC v. Association for the Benefit of Non-Contract
Employees, 380 U.S. 650 (1965) 11, 14, 15, 18, 20

Branti v. Finkel, 445 U.S. 507 (1980) 20

Carey v. Brown, 447 U.S. 455 (1980) 18

Carey v. Piphus, 435 U.S. 247 (1978) 21

Carter v. Carter Coal Co.,
298 U.S. 238 (1936) 21-22

J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 22

Chicago Teachers Union, Local No. 1 v. Hudson,
475 U.S. 292 (1986) 21

Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 24

TABLE OF AUTHORITIES - Continued

Page

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 18

City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 16

Crowell v. Benson, 285 U.S. 22 (1932) 16

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) 16

DeGregory v. Attorney General, 383 U.S. 825 (1966) 14

Department of Agriculture v. Murry, 413 U.S. 508 (1973) 20

Detroit & T.S.L.R.R. Co. v. UTU, 396 U.S. 142 (1969) 19

Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976) 22

Ellis v. BRAC, 466 U.S. 435 (1984) 13, 17

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 15

Eubank v. City of Richmond, 226 U.S. 137 (1912) 22

Graham v. Richardson, 403 U.S. 365 (1971) 20

Herbert v. National Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992) 17

TABLE OF AUTHORITIES - Continued

Page

Hitchman Coal & Coke Co. v. Mitchell,
245 U.S. 229 (1917) 13

Hunter v. Underwood, 471 U.S. 222 (1985) 19

International Association of Machinists v. NMB,
425 F.2d 527 (D.C. Cir. 1970) 17

Knight v. MCCFA, 571 F.Supp. 1 (D. Minn. 1982) 22

Knight v. MCCFA, 460 U.S. 1048 (1983) 22

Manley v. Georgia, 279 U.S. 1 (1929) 19

Midtec Paper Corp. v. United States,
857 F.2d 1487 (D.C. Cir. 1988) 24

Minneapolis Star v. Commissioner of Revenue,
460 U.S. 575 (1983) 18

Minnesota State Board of Community Colleges
v. Knight, 465 U.S. 271 (1984) 22

Motor Vehicle Manufacturers Association v.
State Farm Mutual Automobile Insurance Co.,
463 U.S. 29 (1983) 24

Mt. Healthy School District Board of Education
v. Doyle, 429 U.S. 274 (1977) 19

NAACP v. Button, 371 U.S. 415 (1963) 14

National Cable Television Association
v. United States, 415 U.S. 336 (1974) 22

TABLE OF AUTHORITIES - Continued

Page

NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175 (1967) 13

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 24

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 13, 22

New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3d Cir. 1986) 16

New Motor Vehicles Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) 22

Noto v. United States, 367 U.S. 290 (1961) 16

Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 13, 22

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) 14

Pickering v. Board of Education, 391 U.S. 563 (1968) . . 16, 20

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 18

H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 22

Preseault v. ICC, 494 U.S. 1 (1990) 21

Professional Cabin Crew Association v. NMB, 872 F.2d 456 (D.C. Cir. 1989) 17

TABLE OF AUTHORITIES - Continued

Page

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) 15, 16

Quong Wing v. Kirkendall, 223 U.S. 59 (1912) 16

Railway Labor Executives Association v. NMB, 988 F.2d 133 (D.C. Cir. 1993), *superseded*, 29 F.3d 655 (D.C. Cir. 1994) 24

Russell v. NMB, 714 F.2d 1332 (5th Cir. 1983) 14

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) 16

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) . . . 17

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 21-22

SEIU v. FPPC, 955 F.2d 1312 (9th Cir. 1992) 18

Simon & Schuster, Inc. v. Members of the New York Crime Victims Board, 112 S. Ct. 501 (1991) 18

Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972) 16

Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944) 13, 23

Teamsters v. BRAC, 402 F.2d 196 (D.C. Cir. 1968) 24

Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 3

TABLE OF AUTHORITIES - Continued

Page

United States v. Carolene Products Co., 304 U.S. 144 (1938) 17

United States v. O'Brien, 391 U.S. 367 (1968) 14

United States v. Robel, 389 U.S. 258 (1967) 14, 20-21

United Steelworkers of America v. NLRB, 646 F.2d 616 (D.C. Cir. 1981) 24

Vaca v. Sipes, 386 U.S. 171 (1967) 13, 23

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 22

Virginian Railway v. System Federation No. 40, 300 U.S. 515 (1937) . . . . . *passim*

Vlandis v. Kline, 412 U.S. 441 (1973) 20

Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928) 22

Washington Central Railroad v. NMB, 143 L.R.R.M. 2871 (E.D. Wash. 1993) 24

Wheeler v. Barrera, 417 U.S. 402 (1974) 16

Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984) 24

TABLE OF AUTHORITIES - Continued

Page

Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. I . . . . . *passim*

U.S. Const. amend. V 2, 7, 21

Bituminous Coal Conservation Act, ch. 824,
49 Stat. 991 (1935) 21

28 U.S.C. § 1254 2

National Labor Relations Act § 9(a),
29 U.S.C. § 159(a) 13

Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*
§ 1, First 2, 3
§ 1, Fifth 2
§ 1, Sixth 2, 3
§ 1a 2, 7, 12
§ 1a(1) 14
§ 1a(2) 14
§ 2, Third 2, 3
§ 2, Fourth 2, 3, 7, 10, 12, 14, 19, 22-23, 24
§ 2, Ninth 2, 3, 7, 24
§ 2, Eleventh 2, 13
§ 4 . . . . . 2, 3
§ 5 . . . . . 2, 3

Rules of the Supreme Court of the United States
Rule 12 1
Rule 13 1
Rule 13.1 2
Rule 14 1

Federal Rule of Civil Procedure 12(b)(1) . . . . . i, 9

TABLE OF AUTHORITIES - Continued

Page

Miscellaneous

Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, S. Doc. No. 52, 75th Cong., 1st Sess. (1937) 22

H. Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (1986) 12

Comment, "The Mechanics of Collective Bargaining", 53 *Harv. L. Rev.* 745 (1940) 22-23

J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law* (1974) 22

Moore's Federal Practice 7, 17

Sullivan, "Unconstitutional Conditions", 102 *Harv. L. Rev.* 1413 (1989) 21

Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556 (1945) 23

TABLE OF ABBREVIATIONS

ALPA	Air Line Pilots Association
App	Separate Appendix to this Petition
FedEx	Federal Express Corporation
FEPNO	Federal Express Pilots for a Non-Union Operation, Inc.
FRCP	Federal Rules of Civil Procedure
NMB	National Mediation Board
NLRA	National Labor Relations Act
RLA	Railway Labor Act

No. 95-

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JOSE R. BRAVO, JAMES G. HUTTO,
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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Rules 12 through 14 of the Rules of this Court, Jose R. Bravo *et alia* (the "Pilots") petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

DECISIONS BELOW

The Court of Appeals' judgment is unreported, and appears in the Appendix filed with this Petition ("App") at 1a. The District Court's order is unreported; and its memorandum is unofficially reported at 148 L.R.R.M. 2142. The order and memorandum appear in App at 4a and 6a, respectively. The decisions of the National Mediation Board are reported at 20 N.M.B. No. 4, at 7; 20 N.M.B. No. 13, at 91; 20 N.M.B. No. 21, at 126; 20 N.M.B. No. 86, at 486; and 20 N.M.B. No. 106, at 659. These decisions appear in App at 90a, 87a, 81a, 30a, and 23a, respectively.

JURISDICTION

The Court of Appeals entered its judgment on 25 October 1995. This petition is timely under Rule 13.1 of the Rules of this Court. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves: (i) the First Amendment and the Due Process Clause to the Fifth Amendment to the Constitution of the United States; and (ii) Sections 1, First; 1, Fifth; 1, Sixth; 1a; 2, Third; 2, Fourth; 2, Ninth; 2, Eleventh; 4; and 5 of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* The text of these provisions appears in App at 135a.

STATEMENT OF THE CASE

I. The parties. The Pilots are Flight Deck Crew Members of non-party Federal Express Corporation ("FedEx")[1] who are "employees" within a "craft or class" under RLA §§ 1, Fifth and 2, Fourth. Federal Express Pilots for a Nonunion Operation, Inc. ("FEPNO") is a corporation with supporters among Flight Deck Crew Members (including the Pilots) who oppose certification of any union as their representative. Before the National Mediation Board ("NMB"), FEPNO represented the Pilots and other identified Flight Deck Crew Members, as well as anonymous individuals who

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[1] "Flight Deck Crew Members" are active pilots on FedEx's seniority list.

feared blacklisting by the Air Line Pilots Association ("ALPA").[2] ALPA is a labor organization. FedEx is the largest American air-cargo carrier and a "carrier" under RLA § 1, First. The NMB is an agency of the United States, acting under color of RLA §§ 2, Ninth, 4, and 5. It investigated a "dispute" over union representation among the Flight Deck Crew Members, conducted two secret-ballot elections, and certified ALPA as the representative, under color of RLA §§ 1, Sixth and 2, Third, Fourth, and Ninth. Non-party United States Pilots Association ("USPA") is a labor organization which unsuccessfully sought election by "write-in" votes in the second election. App at 146a-48a.

II. The operative facts. On 14 June 1991, the NMB determined a "dispute" existed, and noticed an election. App at 140a, 90a. On 21 August 1992, ALPA objected to "carrier interference". App at 150a, 90a-91a.

On 22 August 1992, the NMB counted the ballots, and applied its "majority-of-the-majority rule". Under that rule:

- The NMB first determines whether a majority of eligible voters cast valid ballots for *some* representative.
- If less than a majority voted for *some* representative (*i.e.*, if at least 50% of eligible voters returned "void" or no ballots), the NMB certifies no representative.[3]
- If a majority voted for *some* representative, the NMB certifies the union that received a majority of the valid votes for *some* representative, although a majority of eligible voters did not designate that union in particular. App at 149a-51a, 88a n.1, 82a n.1.

Out of 2,279 pilots, 1,162 (50.99%) cast no ballots (in effect "voting" against representation); 1,112 (48.79%) voted for ALPA; and 5 (00.22%) voted for some other representative. The votes for *some* representative were less than a majority. App at 150a, 91a, 30a n.1.

After ALPA successfully pursued its claims of "carrier interference", on 19 October 1992, the NMB ordered a re-run election, using its standard ballot, with ALPA listed by name and

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[2] *See Tony & Susan Alamo Fd'n v. Secretary of Labor*, 471 U.S. 290, 303 n.26 (1985).

[3] A "void" ballot is one with "no" or "no union" written on its face, or otherwise defaced.

a space for write-in votes. App at 133a. The ballot contained the following language:

> No Employee is required to vote. If less than a majority of the employees cast valid ballots, no representative will be certified. **Should a majority vote to be represented, the representative which receives a majority of the votes cast will be certified.**
>
> ---
>
> If you desire to be represented by:
> Air Line Pilots Association
>
> Mark an "X" in this square.....[ ]
>
> ---
>
> If you desire to be represented by:
> ANY OTHER ORGANIZATION OR INDIVIDUAL
> Write name of such organization or individual on the line below:
>
> _____ AND
>
> Mark an "X"in this square.....[ ]
>
> _____

App at 150-51a, 235a (emphasis supplied in **bold-face type** states the "majority-of-the-majority rule"). FEPNO opposed the ballot, moving that

> the [NMB] should use a ballot without a space for write-in votes, or, if the [NMB] use[d] its standard ballot, the [NMB] should require that a majority of eligible voters cast valid votes for ALPA or USPA in order for either organization to be certified and should include a statement on the ballot to that effect.

FEPNO also challenged USPA's participation. But the NMB denied the motion. App at 88a.

In the second election, USPA ran a "write-in" campaign. One of its slogans was that a Flight Deck Crew Member who voted "NO" was effectively voting for ALPA:

- "A 'NO' VOTE...IS A VOTE FOR ALPA!"
- "To vote 'NO' at this time, will ensure that the Air Line Pilots Association is certified as our bargaining agent.
- "2. *Is a vote for USPA a vote for ALPA?*
  "No. According to NMB rules, if the majority of pilots votes for union representation, then the union that receives the majority of votes cast becomes the representative for the pilots.
  "3. *What if I vote 'NO' again?*
  "Given the closeness of the last election, we feel the option of two unions makes representation inevitable.
  To vote NO at this point is in fact a vote for ALPA! The choice is yours."

USPA also used a telephone "hot-line" which represented that a "no vote" was a vote for ALPA. App at 151a-52a, 237a, 240a, 241a, 82a. In fact, a vote for USPA turned out to be a vote for ALPA.

On 14 January 1993, the NMB counted the ballots. Of 2,279 eligible voters, 1,015 (44.53%) voted for ALPA; 271 (11.89%) voted for USPA; and 993 (43.57%) cast no or void ballots (in effect, "voting" against representation). App at 31a. Thus, ALPA received a majority of the votes for *some* representative (1,015 out of 1,286), but less than a majority of eligible voters. Analysis shows the closeness of the vote:[4]

	First Election	Second Election	Difference
ALPA	1,112	1,015	-97
other	5	0	-5
no union	1,162	993	-169
USPA	0[5]	271	+271

[4] These figures are drawn from App at 30a n.1, 31a.

[5] USPA did not participate in the first election.

Had 147 of the 174 "no union"and "other" votes (6.45% of eligible voters) not shifted to USPA, the result would have been: ALPA, 1,015 (44.53%); USPA, 124 (5.44%); and "no union", 1,140 (50.02%). Under those circumstances, the NMB would have certified no representative, as "no union" would have had one-half *plus* one of eligible votes (*i.e.*, 1,140 for "no union" *versus* 1,139 for ALPA and USPA combined).

The NMB certified ALPA only because the "majority-of-the-majority rule" added the votes for USPA to those for ALPA. Neither union received a majority of eligible votes. Moreover, in the first election, ALPA received 1,112 votes (a minority, 48.79% of eligible voters), and was not certified; whereas, in the second election, ALPA received only 1,015 votes (even a smaller minority, 44.53% of eligible voters), but was certified.

On 19 January 1993, FEPNO requested that the second election be set aside, because of USPA's involvement, coupled with use of the "majority-of-the-majority rule" and standard ballot. App at 32a-33a & n.2, 41a-47a. FEPNO submitted affidavits from Flight Deck Crew Members showing that:

- Some opposed ALPA, or representation by any union, but felt compelled to vote for USPA to have a voice in selection of a representative.
- Although some voted for USPA, they would have returned no ballot (*i.e.*, voted "no union") had ALPA been the only choice on the ballot. App at 44a-46a.

On 14 June 1993, the NMB rejected FEPNO's objections, and certified ALPA. App at 79a. Although finding that "USPA's slogan did not constitute a misrepresentation of [NMB] voting procedures and policies", the NMB admitted that

> several crewmembers may have been uncertain whether the best way to defeat ALPA was to vote "no" (or not to vote), or to support USPA. Individual crewmembers weighed the effect of their vote against the anticipated votes of their fellow crewmembers. Several crewmembers were convinced that some form of representation was inevitable and decided to support USPA as the alternative to ALPA. Others believed that, because in their judgment a majority vote for representation

> was not inevitable, it was possible to avoid representation altogether by not returning a ballot.

App at 74a. The NMB denied FEPNO's motion for reconsideration. App at 29a.

III. The Pilots' claims in the District Court. The Pilots and FEPNO brought a civil action, alleging that use of the "majority-of-the-majority rule" and standard ballot was repugnant to the First and Fifth Amendments; or that that use contravened RLA §§ 1a, 2, Fourth, and 2, Ninth. They sought declaratory and injunctive relief, to set aside the certification of ALPA and prohibit the NMB from holding any further election at FedEx unless it adopted an election-rule under which a union must receive a majority of the eligible votes in order to be certified. App at 157a-66a.

The complaint incorporated the affidavit of Professor William Crain. App at 156a ¶ 40, 167a-242a. Crain is an expert in the "Theory of Public Choice", a principal focus of which is how alternative voting-rules affect elections. App at 169a, 176a-77a.[6]

A. The "majority-of-the-majority rule". Crain testified that, in an election with three options (*e.g.*, ALPA, USPA, and "no union"), the "majority-of-the-majority rule" is not an effective means to determine the choice of a majority of eligible voters, compared to various alternative rules. App at 178a, 184a-86a. Crain showed how the "majority-of-the-majority rule" could result in certification of the wrong union (ALPA *versus* USPA) when the actual preference of the majority of eligible voters is *no* union. App at 178a-82a. As Crain explained:

> the NMB accepted as the fact, that some significant number of voters who actually preferred no union at all voted for USPA (a second-best option) only in order to avoid ALPA (the worst option from their point of view).
>
> (a) The decision of some employees *not* to support the outcome they most preferred * * * raises an important and

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[6] As Crain's affidavit was incorporated in the complaint, his testimony had to be taken as true for purposes of respondents' later motions to dismiss. *See* 2A *Moore's Federal Practice* ¶ 12.07[2.-5], at 12-86 to 12-91 & nn.9-12, 18.

> distortive aspect of the NMB's "majority-of-the-majority" rule: namely, that that rule creates an incentive for * * * *strategic voting behavior*, or *gaming behavior*. * * *
>
> (b) Importantly, because the chances that one union wins is tied directly to the votes for other unions under the NMB's "majority-of-the-majority" rule, strategic voting behavior increases the possibility that the outcome least preferred by the majority will win. In the Federal Express election, if an employee who favored no union representation believed that a majority would vote for either ALPA or USPA, and even though ALPA was his or her least desired outcome, a strategic vote for USPA increased the chances that ALPA would win. In effect, strategic voting intended to avoid the worst-case outcome actually had exactly the opposite effect: it increased the chances that the least preferred option would win. If the union votes were not linked (*i.e.*, under an election-rule other than the "majority-of-the-majority" rule), this would not be the case. A strategic vote for a second-best option would not work to the advantage of the least desired outcome.
>
> * * * [T]he direct link between the votes for any union under the "majority-of-the-majority" rule makes the problem of biased and misleading information particularly acute. Information that leads employees to expect that some union will be certified encourages strategic voting. In consequence, this reduces the chances that the majority's preferred outcome will win, and increases the chances that the least preferred outcome will win. [Footnote omitted.][7]

Crain also conducted scientific experiments showing that voters do *not* select the desired outcome using the "majority-of-the-majority rule", but would select that outcome using a run-off election. App at 178a-90a, 192a-93a.

B. The standard ballot. To evaluate the standard ballot, Crain conducted a scientific experiment showing that the ballot "is biased in favor of union certification", and that "a simple, inexpensive

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[7] The NMB admitted that "strategic voting" did take place in the second election. App at 74a, quoted *ante*, at 6-7.

alternative ballot design that explicitly includes the option for an employee to vote for 'No Union' would eliminate the bias". App at 187a, 190a-93a.

Crain concluded that the "majority-of-the-majority" rule and standard ballot

> create the potential conditions for the worst of all possible worlds * * * . With a biased ballot that favors union certification, and the outpouring of information designed to influence expectations that some union would be certified, some employees would reasonably vote for USPA in an effort to defeat ALPA, although those employees would actually prefer a "no union" option to representation by either USPA or ALPA. * * * The factual context * * * raises reasonable and serious doubts that a majority of the employees desires to be represented by ALPA. The most straightforward way to deal with these doubts would be to hold a run-off election between ALPA and "no union" * * * .

App at 193a.

IV. The District Court's decision. The District Court granted the NMB's and ALPA's motions to dismiss under FRCP 12(b)(1). App at 4a, 6a & n.1, 22a. The court made no findings of fact. Rather, it merely noted that the NMB and ALPA "disagree[d] with the conclusions * * * in Crain's affidavit", and "contest[ed]" "Crain's theories and speculations"; but it did not "delve further into the issues and arguments presented by the Crain Affidavit". App at 12a, 14a, 22a.

The court held that the NMB's " 'decision on [the rules governing elections] is not subject to review where there is no showing that it has acted in excess of its statutory duty' ", and that "the merits of [the Pilots'] statutory claims have been previously decided" in various cases (none of which, however, contained the scientific evidence incorporated in the Pilots' complaint). The court also held the Pilots' constitutional claims foreclosed by various cases (again, none of which contained the scientific evidence incorporated in the Pilots' complaint). App at 15a-22a.

V. The Court of Appeals' judgment. The Court of Appeals affirmed, on the grounds that a court

> may review NMB certifications "only upon a 'showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or that it violated the constitutional rights of an employer, employee, or Union.' " *Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir. [1989]) (*quoting International Ass'n of Machinists v. TWA*, 839 F.2d 809, 811 (D.C. Cir. [1988])[,]

and that the Pilots

> allege[d] bias in NMB's standard ballot and "majority-of-the-majority" voting rule through a study attached to [their] pleading. This court will not review these procedures for inherent bias unless this bias is of a constitutional dimension. *See International Ass'n of Machinists*, 839 F.2d at 812 n.1. One sparse study offered by [the Pilots] does not approach this threshold.

App at 2a. This petition followed.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The integrity of the entire system of union representation under the Railway Labor Act is at issue in this case. Here, ALPA has been certified as the Pilots' representative although it was indisputably designated by only a *minority* of those in the "craft or class" eligible to vote—notwithstanding both the mandate of RLA § 2, Fourth that "[t]he majority of any craft or class of employees shall * * * determine who shall be the representative", and this Court's ruling that that section "confer[s] the right of determination upon a majority of those eligible to vote". *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 560 (1937). And here, *for the first time in American labor-law history*, actual scientific analyses and controlled experiments (which at this juncture must be deemed true) have proven that the NMB's "majority-of-the-majority rule" and standard ballot—through the use of which that *minority* union was certified—are incompetent to determine the will of the "majority of those eligible to vote". Yet the lower courts have ruled that science

be damned and the NMB be suffered to certify *minority* unions as it pleases.

This unprecedented and rationally indefensible decision vitiates this Court's determination of what constitutes "majority" rule under the RLA, guarantees labor unrest in interstate commerce, deprives the Pilots of fundamental constitutional rights, and perpetuates the NMB's gross violation of the statute in every other close union-representation election that will hereafter occur under the RLA. As this Court is the final arbiter of both the "majority" rule and the ballot in RLA elections,[8] a grant of the Pilots' petition is imperative to save union representation under the RLA from the perversion of *minority* rule.

I. By licensing the NMB to certify *minority* unions as representatives under the Railway Labor Act, the Circuit Court's judgment endangers labor peace in interstate commerce.

As noted above, at FedEx the "majority of those eligible to vote" has *not* "determine[d] who shall be the representative". Rather, *the NMB* has determined that ALPA shall be the representative: (i) based on the theory that a majority vote for *some* representative (*i.e.*, a vote for *any* union) should be taken as a designation specifically of *ALPA* perforce of the "majority-of-the-majority rule"; and (ii) through the use of the NMB's standard ballot; but (iii) notwithstanding that the Pilots' scientific evidence proves the rule and ballot fatally defective. And the Circuit Court has approved this designation of a *minority* representative without even allowing inquiry into the Pilots' scientific evidence. This unprecedented judgment guarantees labor unrest in the arteries of interstate commerce.

Majority rule insures labor peace. *See Virginian Ry.*, 300 U.S. at 553-54. Absent this Court's reversal of the Circuit Court's judgment, where unions have been designated after a close vote using the "majority-of-the-majority rule" and standard ballot, no

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[8] *See Virginian Ry.*, 300 U.S. at 560; *BRAC v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 669-71 (1965).

employee will believe that such unions necessarily have majority status. Every such election will be tainted with patent injustice.[9] The very posturing of such unions as representatives will create irreconcilable antagonisms among employees, encourage employers to engage in hard bargaining on the presumption that minority unions are unable to prevail in strikes, and generally conduce to a climate of conflict ever ready to break out into industrial strife.

Thus, the Circuit Court's judgment undermines the RLA's regime of industrial peace in the worst way imaginable.

II. The Circuit Court's judgment abridges the Pilots' freedom of association, guaranteed by both the Railway Labor Act and the Constitution.

The Circuit Court's judgment also casts aside the fundamental protection true majority rule provides to the Pilots' freedom of association, thereby abridging that freedom. The court refused to "review [the NMB's election] procedures for inherent bias unless this bias is of a constitutional dimension", and denigrated the Pilots' scientific evidence as "one sparse study" which "does not approach this threshold". App at 2a. This implies that proof the NMB's procedures result in certification of a *minority* union has no constitutional (or statutory) significance. Nothing could be further from the truth.

A. RLA § 1a guarantees "freedom of association among employees", a freedom also protected by the First Amendment to the Constitution. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *BRT v. Virginia* ex rel. *Virginia State Bar*, 377 U.S. 1, 5-6 (1964).[10] Operationally, RLA § 2, Fourth collectivizes that freedom by giving "[t]he majority of any craft or class * * * the right to determine who shall be the representative". The Pilots' participation in this determination itself involved one involuntary

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[9] Cf. H. Arkes, *First Things: An Inquiry into the First Principles of Morals and Justice* (1986), ch. III, especially at 46-47.

[10] Freedom of speech is also involved, because the purpose of the association among employees is "representation" (*i.e.*, speech). The Pilots will label this complex of freedoms simply "freedom of association".

associational relationship. When the NMB certified ALPA, a second on-going, involuntary associational relationship was created between the Pilots and the union.

This involuntary association has significant coercive aspects. Under "exclusive representation", the Pilots may not bargain individually with FedEx. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 200 (1944); *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944).[11] Exclusive representation "extinguishes the individual[Pilot]'s power to order his own relations with [FedEx] and creates a power vested in [ALPA]" and "strip[s the Pilots] of traditional forms of redress". *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). As a consequence of abridging the Pilots' freedom of association, exclusive representation also eliminates their freedom of contract. *Contrast Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 250-53 (1917), *with Allis-Chalmers* and *Vaca*, *ante*.

A further associational relationship may arise if ALPA and FedEx agree that "all employees shall become members of" ALPA, under RLA § 2, Eleventh. Although such an "agency shop" can require only payment of money, payments in excess of a union's costs of collective bargaining violate the First Amendment. *Ellis v. BRAC*, 466 U.S. 435, 455 (1984). That such an agreement is "a significant impingement on First Amendment rights" shows that representation by a union implicates First-Amendment issues. *See id.* at 455. For *only* "a labor organization * * * designated and authorized to represent employees" may negotiate an agency shop under RLA § 2, Eleventh. If a union's attempt to charge employees for expenditures as their representative impinges on First-Amendment freedoms, then necessarily the election by which it became the representative does also.

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[11] The term "exclusive representation" derives from § 9(a) of the National Labor Relations Act ("NLRA"). 29 U.S.C. § 159(a). In construing RLA § 2, Fourth, *Steele* referred to "the like provision" of the NLRA (§ 9(a)), and cited NLRA precedents and legislative history as authority. 323 U.S. at 200, 202 n.3. This equation of the acts followed from earlier decisions. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), *citing Virginian Ry.*, 300 U.S. at 548-49.

The "agency shop" may be constitutional, because the First-Amendment right not to associate with a union through compulsory fees ceases when Congress determines there is a compelling interest in having *a majority* of workers elect the union and having the union collect *properly limited* "agency fees"—which are the least-restrictive alternatives for designating a representative and financing its activities. Conversely, where a union collects fees for *non*bargaining activities, or is elected by only a *minority* of employees in the first instance, there is a First-Amendment violation, because neither is a compelling interest served nor is the least-restrictive means employed.

B. Infringements on First-Amendment rights are justified only if: (a) they serve compelling interests; (b) by the least-restrictive means; and (c) as demonstrated by the government with evidence in the record. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *United States v. Robel*, 389 U.S. 258, 267-68 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964); *DeGregory v. Attorney General*, 383 U.S. 825, 829-30 (1966); *NAACP v. Button*, 371 U.S. 415, 444 (1963).

1. The Pilots assume *arguendo* the RLA serves compelling interests: (1) "[A]voidance of industrial strife, by conference between the *authorized* representatives of employer and employee". *Virginian Ry.*, 300 U.S. at 547 (emphasis supplied); *see* RLA § 1a(1). (2) Freedom of association for employees to designate *no* representative, and the NMB's duty to implement that choice. *Compare* RLA § 1a(2) *with Non-Contract Employees*, 380 U.S. at 669 n.5, *and Russell v. NMB*, 714 F.2d 1332, 1341-42 (5th Cir. 1983). These interests are served, however, only by identifying the Pilots' *true* representative (if any). *See Virginian Ry.*, 300 U.S. at 548.

2. Restriction of First-Amendment rights is permissible if "no greater than is essential to the furtherance of [the compelling] interest". *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Imposition of a representative infringes the Pilots' freedom of association. However, Congress has mandated in RLA § 2, Fourth that "[t]he majority * * * shall * * * determine who shall be the representative"—implying that a greater level of assent would frustrate industrial peace. Assuming *arguendo* that majority rule passes First-Amendment muster because it burdens the minority no

more than necessary to achieve industrial peace, the least-restrictive-alternative issue reduces to whether the NMB's rule and ballot *in fact* identify the *majority's true* choice in a close three-way election involving "strategic voting"—which they do not. *See* App at 178a-90a.

C. No precedent of this Court supports the Circuit Court's judgment.

1. This Court has never sustained *minority* representation under the RLA or the Constitution.

2. This Court has never upheld the "majority-of-the-majority rule", especially against a scientific showing that it results in certification of minority unions.

3. This Court has never upheld the standard ballot. *Dicta* in *Non-Contract Employees* stated that adoption of that ballot did not exceed the NMB's statutory authority. 380 U.S. at 669-71. No *constitutional* issue arose in *Non-Contract Employees*, however. In addition, the Court decided even the statutory issue in a factual vacuum. The challengers in *Non-Contract Employees* attacked the then-new ballot because it contained no "no union" box. But they did not prove the ballot discriminatory. For the NMB adopted the ballot only after the Court granted *certiorari*. *Id.* at 657. No evidence existed as to how the ballot might work in practice. The Court reasoned that a "no union" box was unnecessary based on the *assumption* that the ballot "might well be" favorable to *non*representation. *Id.* at 669 n.5. Here, the Pilots have disproved that assumption, showing that the standard ballot strongly promotes a vote for the union named thereon. App at 190a-93a.

4. The Circuit Court's judgment is the *first* decision of *any* court that squarely sustains ***proven minority*** rule under the RLA, because this is the first case in which scientific evidence as to the actual defects of the NMB's rule and ballot has ever been presented. *None* of the cases cited by the Circuit Court or the District Court involved such evidence.

D. In the absence of controlling precedent, the NMB must adduce evidence that the infringement of its "majority-of-the-majority rule" and standard ballot on the Pilots' First-Amendment rights narrowly serves compelling interests. *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1462-63 (D.C. Cir. 1985). This rule applies even in normal political elections. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989).

1. The NMB, however, has never tested its rule or ballot (as the Pilots have done) to determine whether they *actually* identify employees' ***true majority*** representatives. This is significant in assessing their unconstitutionality. *See Quincy Cable TV*, 768 F.2d at 1463. *No* court has scientifically determined that the rule and ballot actually do what the NMB supposes, or has even considered the Pilots' evidence which *falsifies and refutes* that assumption.[12] And the Circuit Court now says that such evidence is always irrelevant in any event.

2. This Court need not treat as irrebuttable the now falsified notion that the NMB's rule and ballot actually serve compelling interests. "[W]hen, as here, fundamental [First-Amendment] interests are patently burdened," a court "is required to overturn regulations that are premised on [agency] assumptions contradicted by facts". *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259 (3d Cir. 1986). *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Crowell v. Benson*, 285 U.S. 22, 56-64 (1932); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 50-54 (1936); *Pickering v. Board of Educ.*, 391 U.S. 563, 578-79 & n.2 (1968).

3. This Court also need not defer to the Circuit or District Courts, because the latters' decisions are not premised upon an actual "weighing" of any evidence, but on an implicit—and improper—categorical rejection as a matter of law of the type of evidence the Pilots present.

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[12] This is the test of scientific knowledge this Court has adopted. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2796-97 (1993). Thus, all other cases cited by the Circuit and District Courts touching on the NMB's rule and ballot are irrelevant. *See New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1259-60 (3d Cir. 1986). For, in constitutional litigation, a full factual record is mandatory. *E.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236-37 (opinion of Stewart, J.), 244 n.* (opinion of Stevens, J.)(1977); *Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 586-87 (1972). And the Pilots are entitled to a judgment on the evidence in *this* case, not upon some other record in which that evidence does not appear. *See Noto v. United States*, 367 U.S. 290, 299 (1961). *See also Quong Wing v. Kirkendall*, 223 U.S. 59, 64 (1912)("[l]aws frequently are enforced which the court recognizes as possibly or probably invalid if attacked * * * in a different way").

a. Crain's affidavit presents scientific proof, never adduced in any other case, that the NMB's rule and ballot are faulty, and in a close, three-way election conspire to create the "worst of all possible worlds": certification of a *minority* union *when the majority of employees desires no union at all*. App at 193a.

b. Because it was incorporated in the complaint, Crain's affidavit must be taken as true for purposes of a motion to dismiss. *See* 2A *Moore's Federal Practice* ¶ 12.07[2.-5], at 12-86 to 12-91 & nn.9-12, 18.

c. The lower courts should have considered Crain's affidavit, because "[c]ourts have authority to review NMB determinations * * * upon 'a showing on the face of the pleadings that the certification decision was a gross violation of the [RLA] or * * * violated the constitutional rights of an * * * employee' ". *Compare* App at 156a ¶ 40 *with Professional Cabin Crew Ass'n v. NMB*, 872 F.2d 456, 459 (D.C. Cir. 1989). And those courts should have deferred their "peek-at-the-merits" jurisdictional ruling until the merits were heard. *See Herbert v. National Academy of Sciences*, 974 F.2d 192, 197-98 (D.C. Cir. 1992).

4. The NMB's rule and ballot are entitled to no presumption of constitutionality. Judicial review of NMB actions extends to constitutional issues. *Professional Cabin Crew Ass'n*, 872 F.2d at 459. And in constitutional cases, "the standard of review is determined by the nature of the rights * * * violated rather than the power being exercised". *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981). Thus, in *Ellis*, which involved employees' freedom of association in the RLA "agency-shop" context, this Court placed the burden of proof on the union, negating the existence of a presumption of constitutionality where compulsory unionism is involved. 466 U.S. at 457 n.15.[13]

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[13] Even if a presumption of constitutionality did apply here, the Pilots would nevertheless be entitled to attempt to overcome it. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 204, 209-13 (1934). As even the Circuit Court has said, "[i]n the rare and unusual case where the complaint, as supported by objective facts, requires overturning the [NMB's] judgment notwithstanding the vigorous presumption of validity, the court has jurisdiction". *International Association of Machinists v. NMB*, 425 F.2d 527, 542-43 (D.C. Cir. 1970). That, however, is *this* case.

E. Neither the ballot nor the rule is narrowly tailored to serve the compelling interests subtending the RLA.

1. The ballot. The ballot discriminates in favor of the union identified thereon (here, ALPA) and against a "no union" vote, thereby promoting representation. App at 190a-93a. An RLA election is a governmentally compelled competition of associations and ideas: (i) representation *versus* nonrepresentation, and (ii) representation by union *X* (with its particular agenda) *versus* representation by union *Y* (with its particular agenda). Thus, a discriminatory ballot favors a particular state of association *vel non* and a particular message.

Such content discrimination "cannot be tolerated". *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991). "[G]overnment must remain scrupulously neutral when it regulates activity protected by the First Amendment". *SEIU v. FPPC*, 955 F.2d 1312, 1320 (9th Cir. 1992). This rule applies to laws that appear neutral but have discriminatory impacts, and recognizes no exemption for organized labor. *Minneapolis Star v. Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); *see Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980). Content-based regulations are allowable only if the agency proves them both necessary and narrowly drawn to serve a compelling interest. *Boos v. Barry*, 485 U.S. 312, 321-22 (1988). The NMB's standard ballot fails this test.

a. A discriminatory ballot frustrates achievement of the RLA's compelling interest in labor peace by helping to impose a *false minority* representative. Because the RLA does not require employees to select *any* representative, no conceivable interest lies in the NMB's imposing one. The NMB "performs the 'function of a referee'. It does not select one organization or another". *See Non-Contract Employees*, 380 U.S. at 667, 669 n.5.

b. A discriminatory ballot is not the least-restrictive means to achieve the RLA's goals, because it favors a named union (here,

ALPA) over a write-in union (USPA) or "no union".[14] Crain's experiments prove that a ballot with boxes for "ALPA", "USPA", and "no union" would be neutral. App at 190a-93a. As such a ballot is undeniably feasible, the experiments establish that the standard ballot is not necessary. Moreover, the ballot's discriminatory character serves *only* an unconstitutional purpose. Therefore, this Court should presume the NMB uses the ballot unconstitutionally to promote a *pro*-union vote. *See Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Mt. Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977).

2. The rule. a. The "majority-of-the-majority rule" embodies the *irrebuttable presumption* that, when the majority of eligible voters votes for *some* representatives, those voting for *any* representative thereby prefer the *particular* representative that obtains a "majority of the majority". An agency may declare proof of one fact *prima facie* evidence of another fact, *if* a rational connection exists between proof and inference, and *if* the presumption is *not* conclusive. *E.g., Manley v. Georgia*, 279 U.S. 1, 5-6 (1929); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 18-19 (1931). But a vote for union *X* and the conclusion that that vote should be counted for union *Y* have no rational connection.

(1) The presumption negates the command of RLA § 2, Fourth that "[t]he *majority of any craft or class* shall have the right to determine *who* shall be the representative" (emphasis supplied). The presumption decrees that the statutorily prescribed majority shall *not* have this right, but only a right to determine there will be *some* representative; and that "the right to determine *who* shall be the representative" is for the *ersatz* "majority *of the majority*"—which here amounted to a *minority* of the "craft or class". The NMB, however, has no "power to change the plain, literal meaning of the statute", by presumption or otherwise. *Detroit & T.S.L.R.R. Co. v. UTU*, 396 U.S. 142, 159 (1969).

(2) Although irrebuttable, the NMB's presumption is "not necessarily true in fact," must be "often contrary to fact" (as here),

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[14] The ballot's unconstitutionality is exacerbated where the involvement of three choices (ALPA, USPA, and no union) and the defective "majority-of-the-majority rule" caused "strategic voting" that further pressed the NMB's finger on the scales in favor of ALPA. *See ante* at 7-8.

and is unnecessary because the NMB "has reasonable alternative means of making the crucial determination" of the employees' actual preference. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973); *Department of Agriculture v. Murry*, 413 U.S. 508, 514 (1973).

(a) That an employee votes for union *X* demonstrates he does *not* want union *Y* as his representative; for if he did, he could have voted for *Y*. Therefore, imputing his vote for *X* to *Y*, simply because a majority of employees voted for *X and Y*, is nonrational.

(b) The NMB presumes that if an employee votes for *X* he wants representation. Because of "strategic voting", however, his vote for *X* may demonstrate only that he wants no representation by *Y*; whereas, in run-off elections, he would vote for "no union" over *X* or *Y*. Thus, the NMB's presumption can coerce employees into voting for *unwanted* unions. *See* App at 178a-90a, 192a-93a.

(3) The presumption is unnecessary. Unlike a political election, where an office *must* be filled, under the RLA *no* representative need be selected. *Non-Contract Employees*, 380 U.S. at 669 n.5. Moreover, the NMB has reasonable alternative means of making the crucial determination—one or more run-off elections.

Therefore, the "majority-of-the-majority rule" is unlawful, because it embodies an irrebuttable presumption that unjustifiably infringes on First-Amendment freedoms.

b. The "majority-of-the-majority rule" also imposes *unconstitutional conditions* on employees.

(1) Perforce of the rule, in a close three-way election, to vote "no union" an employee risks having his least-preferred option between unions *X* and *Y* designated the representative, with no opportunity to choose between them. *See* App at 182a-84a. But to vote for *X* to *prevent* certification of *Y*, the employee must in effect also vote *for Y*. The rule thus conditions the employee's statutory right to vote for "no union" upon his surrender of both his statutory and constitutional freedoms not to associate with (by voting for) *X*, *Y*, or both.

(2) No agency of government may condition any public benefit on a recipient's surrender of statutory or constitutional rights. *E.g.*, *Branti v. Finkel*, 445 U.S. 507, 513-16 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-34 (1977); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *United States v. Robel*, 389 U.S. 258, 263-

66 (1967). *See generally*, Sullivan, "Unconstitutional Conditions", 102 *Harv. L. Rev.* 1413 (1989). Just as the NMB may not require an employee to vote for a particular union or to eschew voting for "no union" as a condition of voting, so too may it not achieve this result indirectly through the "majority-of-the-majority rule".

(3) A run-off election between the two choices with the greatest number of votes in the initial election (whether that be unions *X* and *Y*, or *X* and "no union") avoids any irrebuttable presumption or unconstitutional condition. Therefore, a run-off election is a less-restrictive alternative than the "majority-of-the-majority rule". Necessarily then, the rule is unconstitutional.

III. The Circuit Court's judgment presents the question of the unconstitutionality of the Railway Labor Act reserved in *Virginian Railway v. System Federation No. 40*, 300 U.S. 515 (1937).

This Court can also rule on due-process grounds that the "majority-of-the-majority rule" and standard ballot are not means "reasonably adopted to [an] end permitted by the Constitution", because they do not accurately determine the will of the majority of employees. *See Preseault v. ICC*, 494 U.S. 1, 17 (1990). Where First-Amendment freedoms are implicated, the Pilots have an *absolute* right to require that the NMB use rational fact-finding procedures. *Compare Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 304 n.13, 306-07 (1986), *with Carey v. Piphus*, 435 U.S. 247, 266 (1978). But, if the RLA does not require true majority support for a union to claim the status of an exclusive representative, then the Act violates the Due Process Clause of the Fifth Amendment.

Carter v. Carter Coal Co. held *un*constitutional exclusive representation in a labor act passed pursuant to the Commerce Clause.[15] 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936); *see also A.L.A. Schechter Poultry Corp.*

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[15] The collective-bargaining provisions of the Bituminous Coal Conservation Act of 30 August 1935, ch. 824, § 4, Pt. III, 49 Stat. 991, 1001-02, *especially* Pt. III(g), 49 Stat. at 1002.

v. United States, 295 U.S. 495, 537 (1935).[16] *Carter* still controls this subject.[17]

After *Carter*, exclusive representation under the RLA and NLRA escaped review because, when the constitutionality of those acts was in issue, the government selected its test-cases "intentionally [to] avoi[d] presenting th[is] Court with th[at] 'touchy' and more doubtful question[ ] '". J.A. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law, 1933-37* (1974), at 187. This Court avoided the problem of *exclusive* representation by construing the acts to permit employees to bargain individually. *Virginian Ry.*, 300 U.S. at 548-49; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).[18] Importantly, too, *Virginian Railway* construed RLA § 2,

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[16] *Carter* premised its holding on *Schechter* and on *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Eubank v. City of Richmond*, 226 U.S. 137 (1912). Since then, these cases have received continuing approbation. *E.g., Eastlake v. Forest City Enterprises*, 426 U.S. 668, 677-78 (opinion of the Court), 683 & n.5 (Stevens, J., dissenting)(1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6-7 (1974); *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *New Motor Vehicles Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 125-26 & n.30 (1978) (Stevens, J., dissenting).

[17] *Pace Knight v. MCCFA*, 460 U.S. 1048 (1983), *aff'g* 571 F. Supp. 1 (D. Minn. 1982)(upholding exclusive representation in a public-sector collective-bargaining law). *Carter* is distinguishable from *Knight* because: In the public sector, there is no delegation of legislative authority to unions, as the governmental employer retains authority over the procedures and substance of collective bargaining. In the private sector, there is a delegation, as the government retains no authority over the substance of bargaining. *Contrast Knight*, 571 F. Supp. at 3-4, *with H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970), *and with Minnesota State Bd. for Comm. Colleges v. Knight*, 465 U.S. 271, 279 (1984).

[18] This reflected the positions of the litigants. *See* Arguments in Cases Arising Under the Railway Labor Act and the National Labor Relations Act Before the Supreme Court of the United States, February 8-11, 1937, S. Doc. No. 52, 75th Cong., 1st Sess. (1937), at 13, 33-34, 40, 88-89, 118. Later, in cases raising statutory issues only, this Court reinterpreted the RLA and NLRA to preclude individual contracts. *Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346-47 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 334-39 (1944). Neither case reconsidered the constitutional matters discussed in *Virginian Ry.* and *Jones & Laughlin*, however. *See* Comment, "The Mechanics of Collective Bargain-

Fourth as "confer[ring] the right of determination [of a representative] upon a majority of those eligible to vote". 300 U.S. at 560. So, *no* decision of this Court has faced the issue of the constitutionality of *exclusive* representation by a *minority* union.

Here, the Circuit Court has held that *exclusive* representation by a *minority* union is constitutional. This judgment squarely presents the constitutional issues reserved in *Virginian Railway* and controlled by *Carter*.

IV. The Circuit Court's judgment licenses a "gross violation" of the Railway Labor Act.

The Circuit Court noted that courts may review NMB certifications if "the face of the pleadings" shows "a gross violation" of the RLA. App at 2a. The Pilots' complaint, incorporating Crain's affidavit, made such a showing. The Circuit Court explicitly ruled that "[o]ne sparse study offered by [the Pilots] does not approach" "bias of a constitutional dimension". App at 2a. Implicitly, the court also sustained the District Court's decision dismissing the Pilots' challenge on statutory grounds. *See* App at 15a-19a.

This Court has held that RLA § 2, Fourth "confers the right of determination [of a representative] upon a majority of those eligible to vote". *Virginian Ry.*, 300 U.S. at 560. Indisputably, ALPA was *not* designated by "a majority of those eligible to vote", but only by the NMB's *ersatz* "majority of the majority". And Crain's affidavit (which at this juncture must be taken as true) establishes that the NMB's rule and ballot do not conduce to the determination of the will of the required "majority of those eligible to vote". App at

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ing", 53 *Harv. L. Rev.* 745, 789-91 (1940). The decision in *Steele* also pretermitted the unconstitutionality of exclusive representation, by creating the "duty of fair representation". *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 198 (1944). *See Vaca v. Sipes*, 386 U.S. 171, 182 (1967); Weyland, "Majority Rule in Collective Bargaining", 45 *Colum. L. Rev.* 556, 568-69 (1945).

192a-93a. Therefore, this case presents as clear-cut a "gross violation" of the RLA as is imaginable.[19]

Labor laws should be construed to avoid constitutional questions. *Steele*, 323 U.S. at 198-203; *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (opinion of the Court), 508-11 (Brennan, J., dissenting) (1979). Thus, rather than declare the "majority-of-the-majority rule" and standard ballot unconstitutional, this Court may invalidate them under RLA § 2, Fourth and Ninth.

Crain's affidavit shows that the NMB has "entirely failed to consider * * * important aspect[s] of the problem". *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In light of that showing a reasonable person could not arrive at the judgment the NMB has made, but instead would conclude either that "there has been a clear error of judgment" on its part, or that its rule and ballot are "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies" of the RLA. *Cf. Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1476 (D.C. Cir. 1984); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *United Steelworkers of America v. NLRB*, 646 F.2d 616, 629 (D.C. Cir. 1981). Certainly, the NMB cannot possibly explain how the RLA can tolerate an election-rule and ballot that are incompetent to perform their functions. *Cf. Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1497 (D.C. Cir. 1988); *Teamsters v. BRAC*, 402 F.2d 196, 205 (D.C. Cir. 1968); *Washington Central R.R. v. NMB*, 143 L.R.R.M. 2871, 2889 (E.D. Wash. 1993).

Thus, on their face the NMB's rule and ballot constitute a "gross violation" of the RLA, which supports subject-matter jurisdiction in the District Court.

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[19] That no specific statutory language prohibits a scientifically invalid rule and ballot is irrelevant. *See Railway Labor Executives Ass'n v. NMB*, 988 F.2d 133, 137-38 (D.C. Cir. 1993), *superseded*, 29 F.3d 655 (D.C. Cir. 1994).

CONCLUSION

The compelling issue in this case is: Can federal courts possibly lack subject-matter jurisdiction to determine whether the NMB's election-procedures are capable—as a matter of scientific fact—of determining the critical element in the scheme of union representation under the RLA: true *majority* rule? In NMB elections, *does truth count*? Or may the NMB designate a representative by casting goats' knuckles or divining birds' entrails? According to the Circuit Court, scientific exposure of the incompetence of the NMB's "majority-of-the-majority rule" and standard ballot may be dismissed as "one sparse study", without inquiry into the factual merits of the analysis and experiments performed, *and even though at this stage of the proceedings that study must be taken as true as a matter of law*. If such cavalier treatment suffices for *this* rule and *this* ballot, why not for *any* election-procedure? And if *no* scientific study may be interposed against *any* NMB election-procedure, then why should not goats' bones and birds' guts be as good as employees' votes to determine what a "majority" supposedly wants? Yet, surely, if voodoo is as valid as votes, then the Circuit Court has given a new dimension to the old saw "the law is an ass".

For all the foregoing reasons, the Pilots' petition should be granted.

Respectfully submitted,

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